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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

CORIVIAN KINARD,

Defendant and Appellant.

B207176

(Los Angeles County
Super. Ct. No. BA310686)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Stephen A. Marcus, Judge. Affirmed.

Jennifer A. Mannix, under appointment by the Court of Appeal, for
Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D.
Matthews and Timothy M. Weiner, Deputy Attorneys General, for Plaintiff and
Respondent.

A jury convicted defendant Corivian Kinard of three counts of second degree robbery (Pen. Code, § 211),¹ one count of attempted second degree robbery (§§ 664/211), and one count of kidnapping to commit robbery (§ 209, subd. (b)(1)). The jury found true the allegations that defendant personally used a deadly and dangerous weapon (§ 12022, subd. (b)(1)) in the attempted robbery, in one robbery, and in the kidnapping to commit robbery. The trial court sentenced her to an indeterminate term of 15 years to life, plus an additional determinate term of 15 years, 8 months. Defendant appeals, contending that the trial court erred in not instructing on theft as a lesser included offense in the robbery of victim Jesus Menjivar. We affirm.

BACKGROUND

Hicks Robbery

On June 2, 2006, Roy Hicks met defendant at a gas station at 40th Street and Figueroa in Los Angeles. He drove her to his motel, where they had a drink. Defendant became hostile when Hicks refused her suggestion that they buy some drugs, and told him to drive her home. Hicks drove her to the location she specified, where an unidentified African American man struck him through the open car window, knocking him unconscious. When Hicks awoke, his wallet, approximately \$500, and his credit cards were missing. When defendant was searched by police officers the next day, she had Hicks' social security card.

¹

All undesignated section references are to the Penal Code.

Reyes Robbery and Kidnapping

On September 28, 2006, defendant and an African American man forced their way into a van driven by Benedicto Reyes, who was stopped at 54th Street and Figueroa. Defendant grabbed a screwdriver and held Reyes' seat belt while the accomplice held a sharp object to Reyes' neck. Defendant and the accomplice demanded Reyes' money, and defendant demanded his ATM card and PIN number. Defendant yelled to the driver of a black car to follow them, and ordered Reyes to drive to two locations. At the second stop, defendant presented Reyes with a credit receipt for him to sign. Rather than sign his name, Reyes wrote that he was being robbed. Defendant became distracted, and Reyes was able to escape. Defendant and the accomplice exited the van, taking Reyes' global positioning device with them. A surveillance video taken at the Hoover Vernon Mini-Market showed defendant exiting Reyes' van and using his ATM card, and showed Reyes escaping.

Menjivar Robbery

On September 30, 2006, around 11:15 p.m., Jesus Menjivar, a Pizza Hut delivery driver, arrived at an address on West 53rd Street to deliver three pizzas. Outside the location, defendant flagged Menjivar down. He got out of the car with the pizzas and approached her. As he told her the price, two African American men came out of a nearby alley and stood on either side of him. They were "really close" to him so Menjivar had "nowhere to move." Defendant stood a foot or two in front of Menjivar.

One of the men (Menjivar was not sure which) said that if he did not give up the pizzas something would happen to him. One of the men also put his hand in his pocket, and Menjivar feared that he had a gun or other weapon. Defendant then

demanded the pizzas and Menjivar handed them to her. Menjivar was scared and panicked. He did not give up the pizzas voluntarily: “I had to give [the pizzas] to them, or I was going to get robbed.” Defendant and the two men then left with the pizzas.

Later that morning, when identifying defendant’s photograph in a photographic spread after the robbery, Menjivar wrote that defendant said that if he did not give her the pizza “the other two guys were going to do something.”

Wang Attempted Robbery

On October 10, 2006, Kenneth Wang was in his car when defendant approached and asked for a ride. Wang let her in, and she asked him to stop just down the street where an African American man was standing. Wang became suspicious, and stopped about 200 feet beyond the man. Defendant produced a knife from her bag and demanded money. When Wang took out his wallet, defendant tried to grab it, and the wallet and some bills fell to the floor. Defendant grabbed some of the money and put it in her bag. A struggle ensued, and two police officers knocked on the driver’s door. Wang told them that defendant had a knife. The officers ordered Wang and defendant out of the car. Inside the car, the officers found a knife with a five-inch blade.

DISCUSSION

Defendant contends that the trial court erred in failing to instruct, sua sponte, on theft as a lesser included offense in the robbery of Jesus Menjivar. We disagree.

Robbery is defined as “the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will,

accomplished by means of force or fear.” (§ 211.) The crimes of grand and petty theft are lesser included offenses of robbery. They require, among other elements, the taking of personal property from another, but they do not involve a taking by force or fear. (§ 484; *People v. Bradford* (1997) 14 Cal.4th 1005, 1055.)

Here, the evidence was undisputed that Menjivar surrendered the pizzas to defendant out of fear of physical harm. Defendant and her two male accomplices stood so close to Menjivar that he had little room to move. At trial, Menjivar testified that one accomplice said that if he did not give up the pizzas something would happen to him. One of the accomplices also put his hand in his pocket as if to simulate holding a weapon. After the crime, when selecting defendant’s photograph, Menjivar told the police that defendant said that if he did not surrender the pizzas her accomplices would do something. When defendant demanded the pizzas, Menjivar gave them to her. As he testified at trial: “I had to give [the pizzas] to them, or I was going to get robbed.”

It is error for a trial court to instruct on a lesser included offense when the defendant, if guilty at all, could only be guilty of the greater crime. (*People v. Stewart* (2000) 77 Cal.App.4th 785, 795-796.) Put differently, the trial court need instruct on a lesser included offense only if “substantial evidence” supports the instruction, meaning evidence from which a reasonable jury could find the defendant guilty of merely the lesser, and not the greater, offense. (*People v. Cole* (2004) 33 Cal.4th 1158, 1215.) In the present case, because the undisputed evidence of the Menjivar robbery demonstrated that defendant took the pizzas by instilling fear of physical harm, the trial court had no duty to instruct on theft as a lesser included offense. No reasonable jury could have found her guilty of that lesser crime.

DISPOSITION

The judgment is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.